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IN THE

Supreme Court of the United States

October Term, 1951

No. 108

BLANCHE M. KENYON, individually and as Executrix under the Last Will and Testament of Bertram C. Kenyon, Deceased,

Petitioner,

vs.

AUTOMATIC INSTRUMENT COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner insists that the facts as stated in the petition for certiorari, and the question as framed therein, are proper.

This reply brief is necessary because

(a) The respondent claims that petitioner has misinformed this Court in its petition; and

(b) Respondent is attempting to divert the attention of the Court from the question raised by the petition.

Reply to Respondent's Brief

1. Respondent, in its brief, seeks to argue the merits of the case. The merits of the case can be fully argued when certiorari has been granted. We submit that respondent has not even attempted to answer the "Reasons for Granting the Writ" in the petition.

Respondent only states that petitioner has misinformed this Court. In the opinion of the Court of Appeals of the Sixth Circuit (R. 482-583) the Court states that the patent notice in question is "vague", and "somewhat meaningless", and attempts to distinguish the pertinent earlier cases relating to patent notices. We submit that the fact that the notice was used while respondent held title to the patent absolutely establishes liability under the law.

The lower Courts elected to overlook the following controlling considerations:

(a) Respondent admitted that it applied the patent notice enumerating the Kenyon patent on all machines manufactured through May 30, 1946 (R. 74), so that the respondent continued to apply the notice after petitioner's formal demand for accounting of royalties was served on respondent in 1941 (Plaintiff's Ex. 25, R. 87), and for several years after this litigation had been started.

(b) Respondent retained ownership of the Kenyon patent No. 1,879,693 until June 15, 1948 (R. 425).

(c) Respondent's predecessor was making player pianos prior to the time that Mr. Kenyon brought this invention to it (R. 91 and 145). The Kenyon invention put respondent's predecessor in the business of manufacturing a phonograph having an automatic record changer.

(d) Respondent assumed the obligations of its predecessor under the Kenyon contract in suit (160 Fed. (2) 878).

Throughout this litigation respondent has been in the anomalous position of **representing** and **admitting** to the general public, **by the use of the patent notice listing the Kenyon patent,** that the machines bearing the notice embody the Kenyon patent of the contract, while at the same time denying to petitioner the payments specified in the Kenyon contract.

2. The decisions cited in the petition, page 7, unequivocally establish the fact that the use of a patent notice upon a product is an admission, binding upon the maker, that the product so marked falls within the scope and purview of the patent and embodies the patented invention. The decision appealed from is the first case in which a contrary ruling on this issue has ever been made, as far as petitioner can ascertain and, apparently, as far as the Courts below and the respondent could ascertain. Each of the cases cited arose under its own state of facts, but the principle that the use of a patent notice is an

admission binding upon the user of the notice is unequivocally stated in each decision.

The **Loney** case does not describe the device there in issue except to say that it was a device of a certain type, and no mention is made whether any change in construction of the device occurred during the term of the license.

In the **Kant-Skore** piston case the licensee claimed defectiveness of the construction shown in the patent, changed that construction, secured a patent upon the changed construction, used a patent notice upon the changed article interpreted by the Court to refer to the licensed patent, paid royalties for a short time on the changed construction, and thereafter attempted to defeat the claim for further royalties on various grounds, including the defense that the changed construction did not embody the patented invention. Hence the **Kant-Skore** case is strikingly **parallel** to the instant case, and attention is called to the fact that the patent notice involved there did not clearly enumerate the licensed patent, but the Court interpreted it as necessarily referring to that patent.

Petitioner submits that the decision appealed from for the first time departs from the previously well established principle that the use of a patent notice is an admission of use of a patent identified by the notice, and that none of the previous decisions can be distinguished from the case at bar as to the question presented by this petition. The decision below creates a sharp divergence between the various Courts of Appeals and with respect to the previous decisions of the Court of Appeals for the Sixth Circuit in the **Kant-Score** case.

Conclusion

Petitioner urges, for the foregoing reasons and for those contained in the petition for writ of certiorari, that said writ be granted.

Respectfully submitted,

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